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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 15

STELLA HUGHES
Petitioner

v.

STATE OF WASHINGTON
Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF
THE STATE OF WASHINGTON

BRIEF FOR THE PETITIONER

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OPINIONS BELOW

This court has granted a petition for writ of certiorari to review the judgment of the Supreme Court of the State of Washington in its cause No. 37,583, **Hughes v. Washington**, entered on January 20, 1966, and published in the official reports as 67 Wn. 2d 799; 410 P. 2d 20 (R. 22-48). A petition for rehearing was

filed within thirty days (R. 48-56) and denied on April 14, 1966, without opinion, and on the same date the remittitur was sent down to the trial court (R. 63-65). The judgment of the trial court, the Superior Court of the State of Washington for Pacific County, in its cause No. 14,546, is unreported but printed herein (R. 16-17; 9-10).

Jurisdiction

The jurisdiction of this court is invoked under 28 U.S.C. Section 1257 (3) reading as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
> "(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

The review of this case also presents a situation governed by Rule 19 of this court:

> "Where a state court has decided a federal question of substance * * * in a way probably not in accord with the applicable decisions of this court."

The Supreme Court of the State of Washington filed its remittitur on April 14, 1966, and the same was sent down to the trial court on that date (R. 64), and within ninety days thereafter, to-wit: July 11, 1966, a

petition herein for writ of certiorari was filed in this court pursuant to Rule 22 of this court. The decision of the Supreme Court of the State of Washington was filed on January 20, 1966, but did not become final until the order denying a petition for rehearing was filed and the remittitur sent down. Rules on Appeal 50 of the Washington Supreme Court provide:

> "Every petition for rehearing shall be filed within thirty days after the opinion in the cause has been filed . . . The filing of a petition for rehearing shall suspend the decision of the court until the cause is finally determined."

An order of this court granting petitioner's writ was entered January 9, 1967.

Statute or Right Involved

No statute as such is involved in this matter, simply: "The validity and the effect of an act done by the United States; it involves the ascertainment of the essential basis of a right asserted under federal law." **Borax Consolidated Ltd. v. City of Los Angeles,** 296 U.S. 10; 56 S. Ct. 23; 80 L. Ed. 9.

Question Presented

The Supreme Court of the State of Washington held in the case under review, contrary to the common law and to existing federal decisions, including a decision of this court, that since November 11, 1889, the date of Statehood, imperceptible accretions added to the

seaward boundary belong to the State, and that the dividing line between upland ownerships and State-owned tidelands is a fixed line which is the line of ordinary high tide and also the line of vegetation as it existed on November 11, 1889.

Therefore, the question is presented: Does Federal rather than State law determine title to imperceptible accretions added to ocean upland owned by one whose title is deraigned from the United States by patent prior to Statehood?

Statement

This action to quiet title was instituted in the Superior Court of the State of Washington for Pacific County by petitioner Stella Hughes as plaintiff (hereinafter referred to as "Mrs. Hughes") against respondent, State of Washington (hereinafter referred to as "State"). (R. 1-3).

Mrs. Hughes is the owner of land in that county extending to and bordering the Pacific Ocean. Her title deraigned from the United States Government by virtue of patent issued July 2, 1866, when the State of Washington was still a Territory. (R. 7, 13)

Imperceptible accretions have formed on her land to the west and ocean side. As she is upland owner, she asserts title to these accretions; further asserts that such boundary line is ambulatory, and asserts that the dividing line between her land and that of

the State tideland is the line of mean high tide as the same now or hereafter may exist. (R. 8-10)

The State claims these gradual natural accretions as of the date of Statehood, November 11, 1889, and also claims that the boundary line is a fixed line as of that date. The State, in essence, seeks to establish a new and intervening title and ownership to a strip of land between the Hughes property and the mean high tide of the Pacific Ocean as it now exists. (R. 3-5) Title to this intervening strip is not academic, but of substance, as may be seen by the following compiled map.

The lower court entered judgment in favor of Mrs. Hughes quieting title to her land as follows:

> "The western boundary of which is the line of mean high tide of the Pacific Ocean as it now or hereafter may exist, which line is the average elevation of all high tides as observed at a location through a complete tidal cycle of 18.6 years, free and clear of any right, title, claim or interest of the State of Washington to any lands accreted to the original donation land claim either prior or subsequent to November 11, 1889." (R. 9-10)

The State appealed and the Supreme Court of the State of Washington reversed the lower court, holding that Federal law did not govern and that all such accretions after statehood belonged to the State. (R. 12, 22-42) Petition of certiorari was timely filed in this court and granted.

Summary of Argument

The location of the boundary line between upland conveyed by the Federal government prior to statehood and State-owned tideland and the nature and extent of the rights conveyed by the government is necessarily a Federal question based on the common law, and Federal law is equally applicable when the problem is one of determining whether imperceptible accretions go with the upland.

The Federal rule on accretions is based on a long standing determination that "mean high tide" constitutes a moveable boundary line wherever in point of time, that "mean high tide" may be located, and the formula for ascertaining that line is defined as the average elevation of all high tides as observed at a location through a complete tidal cycle of 18.6 years. The opinion and judgment of the Supreme Court of the State of Washington under review not only determines the title to imperceptible natural accertions contrary to the common law and long established Federal rule, but adopts a new rule of property, a rule which is not only unsupported by authority, precedent, its own prior decisions and reason, but which has no scientific or natural basis or practical means of locating property lines and which thus leaves the rights of all property owners in a hopeless morass of uncertainty. The opinion of the State court attempts to establish its

title to tidelands on a different footing than that of the other states, and attempts to unconstitutionally deprive property owners of attributes of their title which the United States conveyed to them. Permitting this decision of the State court to stand unreversed will adversely affect the rights and interests of hundreds of ownerships bounded by tidal waters, contrary to law.

Argument

I. FEDERAL LAW CONTROLS; THE DECISION UNDER REVIEW IS CONTRARY TO FEDERAL LAW AND SHOULD BE REVERSED.

Mrs. Hughes, the petitioner, seeks review of the Washington State Supreme Court decision entitled **Hughes v. State of Washington**, 67 Wn. 2d 799, 410 P. 2d 20 (R. 22-42), for the basic reason that that court is deciding a Federal question and its decision is in direct conflct with the common law and the Federal rule as expressed by the Federal courts and this court.

Her position is that she deraigns title from a Federal patent and Federal law must control the establishment of the boundary of her property as between her upland ownership and the State-owned tideland to the west, and the Fedral law must control the method of ascertaining the boundary on the land itself.

The latest Federal decision clearly supports her basic premise. **U.S. v. State of Washington,** 294 F. 2d 830 (9th Cir., 1961, (Cert. den. 369 U.S. 817). That case involved government land also on the coast of the State of Washington with its westerly boundary extending to the Pacific Ocean, and with the State, as here, claiming ownership of imperceptible natural accretions. The sound reasoning of the opinion, written by Circuit Judge Hamley, a former member of the Washington Supreme Court, bears reptition. The opinion states, on page 832:

> "In urging that federal law controls, the Government relies primarily upon the holding Borax Consolidated, Ltd., v. Los Angeles, 296 U.S. 10. In that case Borax Consolidated, claiming as upland owner under a federal patent, brought an action to quiet title to land alleged to be tideland situated in the inner bay of Los Angeles Harbor. It was apparently agreed that the company's land extended to the high-water mark, but there was controversy as to how this mark was to be determined. Declining to be bound in its determination by the definition of the term 'ordinary high water mark' under California law, the court said:
>
> " 'The question as to the extent of this federal grant, that is, as to the limit of the land conveyed, or the boundary between the upland and the tideland, is necessarily a federal question. It is a question which concerns the validity and effect of an act done by the United States; it involves the ascertainment of the essential basis of a right asserted under federal law. Packer v. Bird, 137 U.S. 661, 669, 670; Brewer-Elliott Oil Co. v. United States, 260 U.S. 77, 87; United States v. Holt Bank, 270 U.S. 49, 55, 56; United States v. Utah, 283 U.S. 64, 75.

The opinion in **Borax Consolidated, Ltd. v. Los Angeles,** 296 U.S. 10, was written by Chief Justice Hughes in 1935, and its ruling remains unchallenged. Attempts were made by the State to lessen its authority by arguing that it was not concerned with accretions. But Judge Hamley, on page 832 of the decision states:

> "No question of accretions was involved in Borax, the problem being ascertainment of the boundary between the upland and tideland as it existed at the time the company received its patent, but the principle there announced is equally applicable where the problem is one of determining whether imperceptible accretions go with the upland. If the upland owner is entitled to the imperceptible accretions it is because this is an attribute of title reserved to or obtained by grant from the Government. Thus the determination of the attributes of an underlying federal title, quite as much as the determination of the boundaries of the land reserved or acquired under such a title, involves the ascertainment of the essential basis of a right asserted under federal law."

The court further states on page 834:

> "The common law is the source of the tideland title which the United States held and which passed to the State of Washington when it was admitted to the Union. Federal law follows the common law in determining the measure of the title to lands retained by the United States. The Supreme Court has implicitly so recognized. At common law the person whose land is bounded by sea, lake or river owns any additions thereto resulting from imperceptible accretion.
>
> "[3] In the case of tidal waters such as are involved

here, the high-water mark means the line of high water as determined by the course of the tides, not as determined by physical markings made upon the ground by the water.

◆ ◆ ◆

"* * * the definition of mean high tide is the average elevation of all high tides as observed at a location through a complete tidal cycle of 18.6 years. Borax Consolidated, Ltd. v. City of Los Angeles, supra, 296 U.S. at pages 26-27, 56 S. Ct. 23, 80 L. Ed. 9. This is an unchanging elevation, and the line of mean high tide is where that unchanging elevation meets the shore as it exists at any particular time."

Contrary to the foregoing holding, the **Hughes** decision by the Washington State court arbitrarily holds that the Washington State Constitution, statutes and decisional law change and modify the Federal rules and supersede them. Its conclusion can be stated more simply than its logic. In essence, it determines that at the time of Statehood, the boundary line between upland and state-owned tideland became fixed and unchanging by the line of ordinary high tide as of November 11, 1889; which line is equated to be the vegetation line as of that date. This, then, becomes the westward and seaward boundary of the uplands, and all imperceptible accretions added thereto became the property of the State of Washington.

Charles E. Corker, Professor of Law at the University of Washington, in an exhaustive article on this

very subject in Volume 42 Washington Law Review, pages 33-118, on page 93, points out the conflict:

> "We find no escape from the conclusion that Borax and Hughes are irreconcilable."

II. THE DECISION UNDER REVIEW IS UNSUPPORTED BY REASON, AUTHORITY OR PRECEDENT, AND ATTEMPTS TO CREATE A NEW RULE OF PROPERTY WITHOUT PRACTICAL OR RECOGNIZED MEANS OF LOCATING OR DETERMINING THE EXTENT OF SUCH PROPERTY.

The **Hughes** decision cannot be justified by either precedent or logic. The majority opinion seeks support for its holding in Article XVII of the Washington State Constitution and in its background, and also in legislative enactments, and in administrative and judicial rulings. Article XVII of the State Constitution provides:

> "1. DECLARATION OF STATE OWNERSHIP. The State of Washington asserts its ownership to the beds and shores of all navigable waters in the state up to and including the line of **ordinary high tide,** in waters where the tide ebbs and flows, and up to and including the line of **ordinary high water** within the banks of all navigable rivers and lakes; Provided, that this section shall not be construed so as to debar any person from asserting his claim to vested rights in the courts of the state. (Emphasis supplied.)

"2. DISCLAIMER OF CERTAIN LANDS. The State of Washington disclaims all title in and claim to all tide, swamp and overflowed lands, patented by the United States; Provided, the same is not impeached for fraud."

The historical background of this constitutional provision sheds little light on the problem. Obviously there could have been no prior state law. The phrase "ordinary high tide" can be examined only by recourse to the common law. Apparently overlooked in the decision was the fact that the Washington Territorial Code of 1881 adopted the common law and that this code provision has been carried into the present Washington Code as **R.C.W. 4.04.010.** As has been seen, the common law doctrines applicable here were previously interpreted and established by the Federal courts.

Strangely enough, the historical background of Article XVII of the State Constitution was earlier examined by the Washington Supreme Court and a contrary result reached. The State Attorney General in **Ghione v. State of Washington,** 26 Wn. 2d 635, 175 P. 2d 955, contended then as now, that the upland owner abutting on navigable waters had no right to accretions. The court refused to so hold. So we have two cases, decided only twenty years apart, holding that the same constitutional provision has diverse meanings. The **Hughes** case does not overrule the

Ghione case, but simply denies its relevancy for the expressed reason that one affects a river and the other the ocean or bays. But the constitution refers to **all** navigable waters, and so the distinction is without logical support.

A well recognized rule of statutory construction was adopted early in the State of Washington. In **Irwin v. Rogers,** 91 Wash. 284, 287, 157 Pac. 690, the court said:

> "Where a statute uses a word which is well known and has a definite sense at common law or in the written law, without defining it, it will be presumed to be used in that sense."

If the Washington court in the **Hughes** case had followed its own pronouncement, it would necessarily have determined that the "line of ordinary high tide" in the common law sense would mean an ever moving. ambulatory line and not a fixed line with reference to the property boundaries.

The majority opinion in the **Hughes** case also examined tideland statutes passed subsequent to Statehood in connection with arriving at and trying to support its conclusion. The first tideland statute, Session Laws of 1899, Chapter 3, Section 1, page 132 (R.C.W. 79.01.492, as modified) provided:

> "* * * that any accretions that may be added to any tract or tracts of tide or shore lands heretofore sold or that may hereafter be sold by the state shall belong to the state."

This statute refers to accretions to tidelands when

sold by the State, but no such sale was made to Mrs. Hughes; and as the court itself says, on page 806:

> "This statute does not purport to determine ownership of accretions when the tidelands have not been sold."

This same statute was also interpreted by the State court in the case of **Ghione v. Washington,** 26 Wn. 2d 635, 175 P. 2d 955, and the Washington court said at pp. 650-651:

> "It is clear to us that this act does not apply to the case at bar, as the attorney general contends. The statute in its original form is perhaps confusing, but the amendment clearly shows that it does not relate to accretions in the ordinary sense of the term. that is, accretions to uplands, but, on the contrary, relates to accretions to **tide and shore lands,** and therefore, accretions, by definition, situate below the line of ordinary high tide or ordinary high water which marks the boundary **between** tide or shore land and the adjoining upland. Moreover, the statute expressly applies only to such accretions formed **after** such tide and shore lands have been sold by the state."

The Washington Court next discussed the Session Laws of 1901, Chapter 105, page 217, and Chapter 110, page 225 (R.C.W. 79.16.170, 171) which provide:

> "That the shore and beach of the Pacific Ocean, including the area or space lying, abutting or fronting on said ocean **between ordinary high tide and extreme low tide (as such shore and beach now are or hereafter may be)** from the Columbia River or Cape Disappointment on the south to a point three hundred feet southerly from the south line of the government jetty on Peterson's Point, State of Wash-

> ington on the north, be and the same, **are hereby declared a public highway forever,** and as such highway shall remain forever open to the use of the public. (Emphasis ours) .
>
> "No part of said shore or beach shall ever be sold, conveyed, leased or otherwise disposed of."

This statute simply establishes a highway on the state-owned tideland. It does not define where the line of ordinary high tide may be, nor the time nor the method by which it is to be established.

Although the Washington court in the Hughes opinion must necessarily admit the boundaries may shift and that the tide line may well change (p. 807 of Opinion; R. 32) its bootstrap reasoning is, (having decided that the land side boundary should be a fixed line), that only the line of low tide may shift. This inconsistency is best portrayed by unchanging natural law. As a boundary line at a mean elevation at low tide shifts seaward, so must the line of mean high tide also shift. The rise and fall of the tides are not a matter of judicial speculation, but of astronomical fact. Normally as the character of the land changes in height by accretion so does the unchanging elevation of the tidal plane intersect the land at different points at all tidal levels.

If, in fact, as argued, the vegetation line and the line of ordinary high tide of 1889 remains fixed, there could be no land sold by the Washington State Com-

missioner of Public Lands on the land side of the highway reservation. The Commissioner, of course, has sold some, and as Professor Corker well states in his article in 42 **Washington Law Review,** page 86:

> "The dilemma is resolved by the court's construction which gives 'ordinary high tide,' two different meanings: a fixed line in the constitution, a moving line in the 1901 statute. This leaves the Commissioner with some accretion lands to sell."

In referring to the nature of tides, the Washington court refers to **Marmer,** US. Dept. of Commerce, Coast and Geodetic Survey, Special Pub. 135, Rev. Ed. 1951, in which it is stated:

> "In view of the variations to which the height of high water is subject, mean high water (tide) at any place may be defined simply as the average height of the high water at that place over a period of 19 years." (R. 34)

It also quotes from **Shalowitz,** 1 Shore and Sea boundaries 89, United States Department of Commerce 1962 as follows:

> "Boundaries determined by the course of the tides involve two engineering aspects: a vertical one, predicated on the height reached by the tide during its vertical rise and fall, and constituting a tidal plane or datum, such as mean high water, mean low water, etc.; and a horizontal one, related to the line where the tidal plane intersects the short to form the tidal boundary desired, for example, mean high-water mark, mean low-water mark * * * The first is derived from tidal observations alone, and, once derived (on the basis of long-term observations, **is for all practical purposes a permanent one.** (R. 35)

The court then agrees with the cited authorities that "mean high tide" is measurable and determinable (p. 810 of Opinion; R. 35).

The court, however, does not follow the only scientific formula laid down by the acknowledged experts in the field, but substitutes its own definition as follows:

> "* * * On the other hand, 'the line of ordinary high tide' as used in article 17 of the constitution is not a term of technical exactness. It is indefinite at best and an oversimplification of a phenomenon inherently complex and variable. In the absence of any indication to the contrary, we deem the word 'ordinary' to be used in its everyday context." (R. 35)

It is clear, therefore, that the court discards the Coast and Geodetic Survey formula as set out in **Marmer**, and adhered to in the **Borax** case, and adopts a new definition which, in itself, is impossible to correlate with any known method of locating the line of "ordinary high tide" on the ground. Marmer states that the heights of high and low water at any place varies from day to day:

> "In the change in range from day to day, the tide reveals clearly the presence of three variations, each associated with the moon." (page 5)

and on page 6 says:

> "Since the rise and fall of the tide varies from day to day, any tidal characteristics deriving from a short period of observations may vary considerably from the average or mean values."

The rejection of the Washington court of the common law definition based on scientific determination and established precedent and the substitution of its own concept is completely unjustified, and its explanation for so doing is certainly not clear.

If the **Hughes** opinion is to stand, all coastal and tidal ownerships will be faced with the insoluble problem of determining the line of "ordinary high tide" of 1889 which is not the "mean high tide" line as set out by the Coast and Geodetic survey formula, but corresponds with the vegetation line of 1889 which is impossible to locate. The **Hughes** definition of "the line of ordinary high tide" proposes no formula for locating the same, nor can it be done from any known data.

The court also turns to administrative and unreported lower court interprtations in an effort to support its conclusion. The court says that the Washington State Commissioner of Public Lands has established the line of "ordinary high tide" where it existed in 1889 on the basis of seventy-three lower court law suits which vary in minor respects. (R. 36) All of these cases were settled in the Superior courts for Pacific and Grays Harbor Counties; none were reported and none were appealed. (R. 36)

It should be stressed that these cases, with but two exceptions, were settled by agreement between the land owner and the State. In none of these cases is

there a judicial determination of the method to be used in establishing this theoretical line. There has never been cited any official public statement by the Washington Commissioner of Public Lands stating how any private land owner may determine his western boundary—none exists. No doubt the western, or seaward boundary line presumably established by the State of Washington in 1949 (referred to as the coordinate system of land measurement (R. 36) was based on the Coast and Geodetic survey data and formula. But this we cannot know, since we are not informed. Neither are we informed by what theory or method this theoretical line is made coincidental with the vegetation line of 1889.

Inspection on the ground as of now is of little help in determining the vegetation line of 1889. It would seem apparent that engineers for the State of Washington or anyone else would be helpless in attempting to determine a line established by judicial ruling for which no precedent exists and with any physical evidence thereof having been lost in antiquity.

The Washington Supreme Court in the **Hughes** case next refers to its own prior decisions in attempting to support its conclusion. The court first refers to **Eisenbach v. Hatfield,** 2 Wash. 236, 26 Pac. 539 (1891), stating on page 813 (R. 39):

"We conclude that its ownership is resolved by the

rationale of **Eisenbach,** and that accretion formed since November 11, 1889, is an addition to state-owned property, not to upland property."

But the Eisenbach case **did not involve accretions,** and since none existed, the Eisenbach opinion refused to consider what the future might entail.

The **Eisenbach** case was later construed in **Hill v. Newell,** 86 Wash. 227, 230; 149 Pac. 951, 952 (1915), which held:

"The riparian right * * * is not a right in the bed of a stream **unless new land results from accretion, reliction or avulsion.**" (Emphasis supplied)

The court also relied on **Harbor Line Commissioners v. State, ex rel Yesler,** 2 Wash. 530, 27 Pac. 550 (1891), which simply held that the owner of the uplands had no right to build a wharf below the line of ordinary high tide. The question of accretions did not arise.

The court refers to **Washougal & LaCamas Transp. Co. v. Dalles P & A Nav. Co.,** 27 Wash. 490, 68 Pac. 74 (1902). This case holds pointedly that shore lands created by erosion do not belong to the State nor to the State's grantee. It is interesting to note that the Washington court in the foregoing case adopted the rule for which Mrs. Hughes contends here; that is, that this is a Federal question. The court in the **Washougal** case, at page 496, stated:

"What title or right passes under a grant of lands made by the United States is **a federal question,** and the judgment of a State Supreme Court is within

the appellate jurisdiction of the Federal Supreme Court." (Emphasis supplied)

The cases which were of controlling importance to any decision to be rendered by the Washington Supreme Court in the **Hughes** case and which had to be met head-on by the court were its own decision in **Ghione v. State,** 26 Wn. 2d 635, 175 P. 2d 955 (1946), the decision of the Court of Appeals for the Ninth Circuit upon essentially the same set of facts and circumstances in **United States v. Washington,** 294 F. 2d 830 (9th Cir. 1961), and the prior decision of this court in **Borax Consolidated Ltd. v. Los Angeles,** 296 U.S. 10, 80 L. Ed. 9, 56 Sup. Ct. 23 (1935).

The dissenting opinion of Judge Hill of the Washington court recognized the importance of these decisions and by giving weight to the principles which they represent concluded that there was a ridiculously short and simple solution to the problem; that Federal law was applicable; that a "shifting boundary" applied; that this was the result dictated by common law and by Federal law; that it was a plain and well-traveled legal path, that it preserved the rights of all parties to what they bargained for and established what they actually owned, and, accordingly, that the westward or seaward boundary fixed by the trial court of Pacific County should be affirmed (pp. 816-821, R.

42-48). The dissenting opinion (p. 818, R. 44), commenting on the majority opinion, further stated:

> "To arrive at the result the state desires (and the majority approved), a new, circuitous and rather devious route, rarely explored, must be followed."

The majority opinion, on the other hand, brushes off the controlling **Borax, Ghione** and **United States v. Washington** cases with a brief and ineffectual attempt to distinguish them. It asserts that **Borax** does not involve the question of accretion, but fails to come to grips with the fact that the principle pronounced in **Borax** is equally applicable in cases of accretion, as was pointed out by Judge Hamley in **United States v. Washington,** 294 F. 2d 830 at page 832. With respect to its own **Ghione** decision, the court attempts to distinguish that case on the ground that it involved river waters, not tidal waters; but the Constitution of the State of Washington makes no such distinction. Finally, with respect to **United States v. Washington,** 294 F. 2d 830, the Washington court inferentially agrees that it is arriving at a different result than that case, but states that although the Court of Appeals has a right to establish any rules of property it wishes with respect to the Federal government's rights in its own property, that the controversy of the State with Mrs. Hughes presents a question to be determined by state and not federal law, even though

Mrs. Hughes derived her title from the United States Government. In short, the State court ignores its own prior determination that a matter of this kind is a Federal question, as it determined itself in **Washougal & LaCamas Transp. Co. v. Dalles P. & A. Nav. Co.**, 27 Wash. 490, 68 Pac. 74 (1902).

On analysis, the authority for the Hughes opinion can be reduced to the weight given a scientifically unsupported administrative interpretaton of the Commissioner of Public Lands as expressed in seventy-three Superior Court decisions, all but two being non-adversary, none appealed, and none reported.

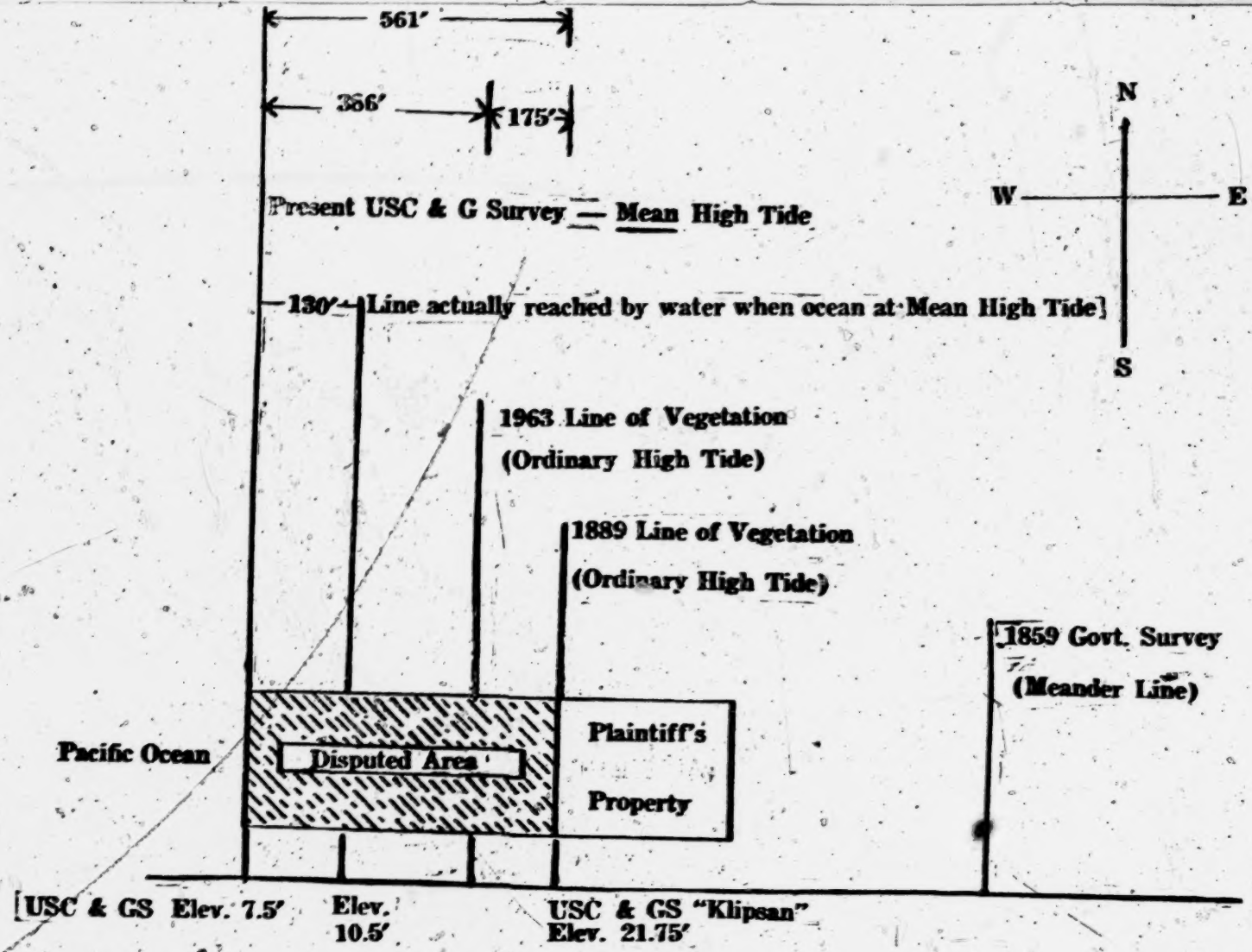
Untenable, too, is the position of the majority opinion in regard to erosion. As is stated by Judge Hill in his dissent at page 821 (R. 47):

> "Under the majority rule, the upland owner would continue to have title to the 1889 line, and the public seemingly would have to swim to enjoy its 'highway' and beach rights. Only under the shifting boundary rule will the rights of the public always be preserved * * * 'in waters where the tide ebbs and flows'."

Here, then, is a decision which creates a new concept of real estate law without the authority of past precedent, either State or Federal, that should have been decided under Federal law, but which is irreconcilable with the applicable Federal rule and the applicable common law, and probably irreconcilable with its own prior decisions which it does not overrule. Such an opinion should be stricken down and reversed.

III. THE DECISION UNDER REVIEW, IF NOT REVERSED, WOULD CREATE A RULE OF PROPERTY THAT WOULD LEAVE THE OWNERSHIP AND BOUNDARIES OF THE COASTAL LANDS OF WASHINGTON STATE IN A CONDITION OF HOPELESS UNCERTAINTY; IT WOULD PLACE UNWARRANTED RESTRICTION ON THE RIGHT OF THE UNITED STATES TO CONVEY PROPERTY RIGHTS AND ITS CITIZENS TO RECEIVE THOSE RIGHTS; AND IT WOULD UNCONSTITUTIONALLY DEPRIVE THE PETITIONER AND THOSE SIMILARLY SITUATED OF THEIR PROPERTY RIGHTS.

Mrs. Hughes does not rest her claim for relief upon the sole ground of a conflict between State and Federal law, and upon her claim that, as between the two, the Federal law necessarily governs. The merits of her position extend further than that issue. Mrs. Hughes and those similarly situated in hundreds of ownerships are presently immersed in a morass of uncertainty over their land ownerships and the nature and extent thereof. If the decision of the Washington State Supreme Court is to stand, Mrs. Hughes now owns substantially less rights than those purchased by her original predecessor in interest from and conveyed by


561'
366'
175'
N
W
E
S
Present USC & G Survey — Mean High Tide
130'
Line actually reached by water when ocean at Mean High Tide
1963 Line of Vegetation
(Ordinary High Tide)
1889 Line of Vegetation
(Ordinary High Tide)
1859 Govt. Survey
(Meander Line)
Pacific Ocean
Disputed Area
Plaintiff's
Property
USC & GS Elev. 7.5'
Elev.
10.5'
USC & GS "Klipsan"
Elev. 21.75'

the United States Government one hundred years earlier. No attorney or engineer can now advise her or her neighbors where or how this boundary line can now be located.

The definition of "ordinary high tide" as framed by the majority decision is based on no known data reducible to an engineering formula. An attempt is made to correlate the line to a vegetation line as of seventy-five years ago, but this data does not exist either in time or place. A vegetation line can only be established by visual observation at a particular time and place, and will change according to nature's laws which have not yet been reduced to a specific engineering or judicial rule. The variations of nature in respect to vegetation and the soil upon which it grows are reflected only by a botanical study as distinct from the action of the tides, and any reference to such a line without the background is, as the sketch appearing in the **Hughes** decision on page 803, (R. 26-27), **pictorial rather than precise.**

Mrs. Hughes is not alone in her predicament; all tidal boundaries of the State of Washington are involved. She does not here stress the vast amounts of money that have been invested by individuals and municipalities for waterfront property, nor the economic and social value thereof, but she does represent the position of the average citizen who buys waterfront prop-

erty because he has been taught during his lifetime to expect that his water boundary would be the water, and not be closed in by a new and intervening strip subject to sale or lease at the whim of the Legislature or of some State department.

To permit the majority opinion of the Supreme Court of the State of Washington in the case on review to stand would place an unwarranted and illegal restriction upon the right of the Government to convey property rights to a citizen and upon the right of a citizen to receive the benefit of those rights. Those situated as Mrs. Hughes, who purchased waterfront property and deraign title from the United States Government, acquired with their property the right under Federal law to any accretions as an upland owner so that the boundary of that property would remain the waterfront for which the owner bargained and paid. The State of Washington or any other state or department thereof, either by judicial pronouncement or otherwise, may not take those rights away from the owner and set up an intervening ownership in its place without compensation. The action of the State constitutes an unwarranted and unconstitutional interference with the rights of the United States and an unwarranted and unconstitutional interference with the rights of citizens such as Mrs. Hughes.

CONCLUSION

For all of the reasons set forth above, Mrs. Hughes respectfully submits that the judgment of the court below should be reversed.

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